IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 446 of 1981

For Approval and Signature:

Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

KALYANSINH VIRJI JADEJA

Versus

HARIDAS SAVJI RAJANI, THRO' PAH VRAJLAL PURSHOTTAM SUCHAK

Appearance:

1. Second Appeal No. 446 of 1981

MR BP TANNA for Petitioner No. 1

MR JR NANAVATI for Respondent No. 1

CORAM : MR.JUSTICE K.M.MEHTA

Date of decision: 19/12/2001

ORAL JUDGEMENT

1. Kalyansinh Virji Jadeja-appellant (original defendant) has filed this Second Appeal under Section 100 of the Civil Procedure Code against the judgement and decree dated 25.11.1981 passed by the learned Assistant

Judge, Jamnagar in Regular Civil Appeal No. 37 of 1981. the learned judge by the impugned judgement was pleased to dismiss the appeal and ordered that the plaintiff is entitled to Rs. 576/- only towards rent. The learned appellate judge was pleased to confirm the judgement and decree dated 27.11.1980 passed by the learned Civil Judge (J.D.), Bhanvad Jamjodhpur in Bhanvad Regular Civil Suit No. 67 of 1978. The learned trial judge has decreed the suit of the plaintiff (respondent herein) and ordered the defendant (appellant herein) to handover vacant and peaceful possession of the suit premises to the plaintiff.

2. The facts giving rise to this appeal are as under:

2.1 There is a property situated at village Verad, taluka Bhanvad, Dist. Jamnagar. The suit premises No. 1 consists of a shop on the ground floor and a room and agasi on the first floor which were given on monthly rent of Rs. 12/-. The other suit premises were given on monthly rent of Rs. 6/- which consist of room on the ground floor and a room on the first floor.

2.2 The defendant has paid rent upto S.Y. 2029 but he did not pay rent for the years commencing from S.Y. 2030. It is the case of the plaintiff landlord that premises No. 1 was given on monthly rent of Rs. 12/and the other premises were given on monthly rent of Rs. 6/-. The defendant-tenant has not paid rent for about 54 months i.e. from S.Y. 2030 to S.Y. 2034 which comes to Rs. 648/and Rs. 324/- respectively.

2.3 Thereafter, the plaintiff addressed a letter dated 10.3.1978 to the defendant-tenant at Exh. 21 terminating the tenancy in question. The defendant-tenant replied to the said notice on 21.3.1978 denying the contentions raised in the said notice. It appears that the plaintiff also addressed another letter dated 6.6.1978 at Exh. 29 to the tenant terminating the tenancy and claiming arrears of rent.

2.4 The plaintiff thereafter filed Suit No. 67 of 1978 before the trial court on 14.8.1978 for possession of the suit premises.

2.5 The defendant-tenant filed written statement on 7.0.1978. One of the contentions raised by the defendant-tenant was that in connection with repairing of the suit premises he has spent about Rs. 1083/- and the said amount has to be adjusted against the payment of

rent and therefore the defendant-tenant is not in arrears of rent. Therefore, the plaintiff landlord is not entitled for possession of the suit premises. Thereafter, the parties have led evidence both oral and documentary. The trial court by its judgement and decree dated 27.11.1980 was pleased to arrive at findings that the plaintiff proved that there was a relationship existing between the plaintiff and the defendant as landlord and tenant. The suit notice dated 10.3.1978 at Exh. 21 issued under Section 106 of the T.P. Act was legal and valid. The court also arrived at the conclusion that the defendant-tenant was in arrears of rent as contended by the plaintiff. The learned trial did not believe the defence of the defendant-tenant that he has spent Rs. 1083/- towards repairing the suit premises. He has also considered that the defendant has filed counter claim and therefore the defendant was in arrears of rent as contended by the plaintiff. The learned trial judge held that the plaintiff filed to prove that the defendant has sub-let the premises. As regards the additional issue, the learned trial judge held that the defendant failed to prove the counter claim of Rs. 1083/- and therefore the learned judge did not decide the issue regarding limitation. Ultimately, the learned trial judge decreed the suit of the plaintiff and decided the suit in favour of the plaintiff and against the defendant.

2.6 Being aggrieved and dissatisfied with the aforesaid judgement and decree, the defendant-tenant filed Regular Civil Appeal No. 37 of 1981 before the District Judge, Jamnagar.

2.7 As indicated earlier the learned District Judge by his judgement dated 25.11.1981 was pleased to dismiss the appeal of the appellant-tenant and the learned appellate judge came to the conclusion that the decree passed by the learned trial judge is legal and valid and there is no error in the order passed by the learned trial judge.

3. Being aggrieved and dissatisfied with the aforesaid judgement of the learned appellate judge, the original defendant has filed this Second Appeal before this court on 31.12.1981. In the memo of appeal as amended by the order of this court dated 13.1.1982 the following ground was raised:

"The Government of Gujarat has issued a Notification bearing No. CR/J/273-DRX-1871/G/1978-A(1) published in Government Gazette Part IV-B, 1973, at page 169

dated 23.1.1973, extending the provisions of the Part II of the Bombay Rent Act with effect and from the date of publication of the Notification to the areas of Gram Panchayat, Nagar Panchayats and Nagar Palikas of the Gujarat State having population of 5000 and above. It is submitted that as per the Census published by the Director of Census Operations, Gujarat in 1971, the population of Varal village was 4334. The appellant has reliably learnt that as per the 1981 Census the population of Varal village is more than 6500. At the time of filing of the original suit, the population was bound to be more than 5000. The fact that the population of Veral village in 1971 census was 4334 is shown at page 48 of PART X-B, village and townwise Primary Census Abstract published for Jamnagar district in 1971 by the Director of Census Operations. The suit notice ex. 28 was given in March, 1978 and there cannot be any doubt that the population of village Veral cannot be more than 5000. The number of occupied houses given in the Census was 714 in 1971 between 4234 residents. This shows the shortage of houses."

3.1 It appears that on 13.1.1982 the following substantial questions of law have been raised by the appellant.

"1. Whether in the facts and circumstances of the case the notification dated 23.1.1973 issued by the State of Gujarat under sub-section (3) of Section 2 is ultra vires Article 14 of the Constitution as it makes hostile discrimination between villages having the population of 3500 at the time of preliminary census of 1971 and those gram and nagar panchayats having less population than 5000 on the said date?

2. Whether in the facts and circumstances of the case the said notification is ultra vires Articles 14 of the Constitution of India in so far as said notification has adopted irrational criteria of population found in the preliminary census of 1971?"

4. Mr. B.P. Tanna, learned senior counsel for the petitioner has addressed me in the Second Appeal on the question of added ground which has been added by the

order dated 13.1.1982 and also invited my attention to the substantial questions of law raised. Now it may be noted that before the trial court as well as the appellate court the issues which have been raised in the additional ground as well as in the substantial questions of law were not raised and they have been raised for the first time before this court. In fact, in the additional ground it has been stated that as per the Census of 1971 the population of Varad village was 4334 and therefore it was submitted that as per the Census of 1981 the population of Varad village might have been more than 6500. No evidence has been led by the appellant in this behalf and therefore it has been submitted that at the time of filing of original suit the population was to be more than 5000. However, no documentary evidence has been led to show that the population of village Varad exceeded 5000. In view of the same, the learned counsel for the petitioner cannot rely upon the Notification published by the Government of Gujarat in Government Gazette dated 23.1.1973 extending the provisions of Part II of the Bombay Rent Act with effect and from the date of publication of the Notification to the areas of Gram Panchayat, Nagar Panchayats and Nagarpalikas of the Gujarat State having population of 5000 and above and Rent Act will be applicable. The said Notification may not be applied in this case because the factual foundation of fact by the petitioner has not been led before the trial court or the appellate court.

5. The learned counsel for the petitioner has also relied on two substantial questions of law. Both these questions of law are in the realm of Constitutional law and not of Civil law and it is not based on the facts which have been proved before the trial court and which were subject matter of the judgement by the trial court as well as the appellate court and it will not be possible for this court to entertain the additional substantial questions of law raised by the appellant.

6. The learned counsel for the respondent stated that in this case the landlord has determined and terminated the tenancy by the notice dated 10.3.1978 at Exh. 21 and the appellate court has relied on the provisions of Section 106 of the Transfer of Property Act and held that the notice is legal and valid. Section 106 of the Transfer of Property Act provides for duration of certain leases in absence of written contract or local usage and Section 111 of the T.P. Act provides for determination of lease, particularly, a lease of immovable property determines under clause (h) of Section 111 of the T.P. Act reads thus:

"On the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other".

7. It is an admitted fact that before the trial court as well as the appellate court Rent Act is not applicable and validity of notice is required to be determined with reference Section 106 of the T.P. Act and therefore notices dated 10.3.1978 at Exh. 21 and 6.6.1978 at Exh. 29 which determine the tenancy. The tenancy has been properly determined under Section 111 of the T.P. Act. In support of the contention the learned counsel for the respondent has relied on the judgement of the Hon'ble Supreme Court in the case of V. DHANAPAL CHETTIAR VS. YESODAI AMMAL reported in AIR 1979 SC 1745 in which at para 6 on page 1747 the Hon'ble Supreme Court has held thus:

"Section 111 deals with the question of determination of a lease, and in various Clauses (a) to (h) methods of determination of a lease of immoveable property are provided. Clause (g) deals with the forfeiture of lease under certain circumstances and at the end are added the words "and in any of these cases the lessor or his transferee gives notice in writing to the lessee of his intention to determine the lease." The notice spoken of in Clause (g) is a different kind of notice and even without the State Rent Acts different views have been expressed as to whether such a notice in all cases is necessary or not. We only observe here that when the State Rent Acts provide under what circumstances and on what grounds a tenant can be evicted, it does provide that a tenant forfeits his right to continue in occupation of the property and makes himself liable to be evicted on fulfilment of those conditions. Only in those State Acts where a specific provision has been made for the giving of any notice requiring the tenant either to pay the arrears of rent within the specified period or to do any other thing, such as the Bombay Rent Act or the West Bengal Rent Act, no notice in accordance with Cl. (g) is necessary. A lease of immovable property determines under Cl. (h):-

"On the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the

other."

It is this clause which brings into operation the requirement of Section 106 of the Transfer of Property Act. Without adverting to the effect and the details of waivers of forfeiture, waiver of notice to quit, relief against forfeiture for non-payment of rent etc. as provided in Ss. 112 to 114A of the Transfer of Property Act, suffice it to say that under the said Act no ground of eviction of a tenant has to be made out once a contractual tenancy is put to an end by service of a valid notice under S. 106 of the Transfer of Property Act. Until and unless the lease is determined, the lessee is entitled to continue in possession. Once it is determined it becomes open to the lessor to enforce his right of recovery of possession of the property against him. In such a situation it was plain and clear that if the lease of the immoveable property did not stand determined under any of the Clauses (a) to (g) of Section, a notice to determine it under S. 106 was necessary."

8. I have considered the record of the case and also memo of Second Appeal as amended by the learned counsel for the appellant. I have also considered substantial questions of law formulated while admitting the Second Appeal. Both the substantial questions of law were not raised before the trial court as well as the appellate court. I have also considered the judgement of the Hon'ble Supreme Court in the case of V. Dhanapal Chettiar Vs. Yesodai Ammal (supra). Whether the population of a village is what figure is a question of fact which has to be urged before the trial court and the appellate court and the trial court and the appellate court after considering evidence on record gave its findings that the plaintiff proved that there was a relationship existing between the plaintiff and the defendant as landlord and tenant. During the entire hearing the question of population of the village was not raised by the appellant. The question of fact which has been urged in the memo of Second Appeal was already existing when the proceedings were initiated before the trial court and the appellate court. The contention raised by the learned counsel for the appellant that the population of Varad village in the year 1971 was 4334 and thereafter as per 1981 census the population of the village was more than 6500, was raised for the first time before this court. These facts were already available to the learned counsel for the appellant. In view of the

same, the learned counsel for the appellant is not allowed to raise this substantial question of law in this behalf. In view of the same, the findings of the trial court as well as the appellate court are required to be confirmed.

9. In view of the same, I do not find any substance in the appeal filed by the appellant and hence the appeal is dismissed. The orders passed by the trial court as well as the appellate court are confirmed. No order as to costs.

(K.M. MEHTA, J)
(pkn)